

House Select Committee on Homeowners Associations

October 20, 2010



Committee Charge ~

- Study issues concerning the protection and participation of homeowners in the governance of their homeowners associations, particularly as to assessments and recordkeeping of the associations, and other relevant issues deemed appropriate
- Authorized to submit an interim report and proposed legislation by May 1, 2010, and required to submit a final report by February 1, 2011.

Overview of Committee Activities

- 6 meetings held January through April 2010
- Interim Study Report and Findings issued



Committee's Findings

- **Board Accountability**
- **Disclosure**
- **Declarant Transfer**
- **Consumer Protection**
- **Foreclosure**
- **Clarification of Solar Access Law**

Finding 1 Demographics

Issues associated with homeowners associations (HOAs) can reasonably be expected to increase rather than decrease as the number of associations operating in the State grows along with population

Finding 2

Board Accountability

Need to provide homeowners with better recourse when seeking to challenge actions by HOA Boards

- Committee received complaints concerning flagrant violations of the applicable statutes and/or HOA bylaws (failing to give required notice of meetings, holding meetings in secret, failing to provide records to homeowners when requested, unauthorized use of association funds, and arbitrary enforcement of covenants)
- Only recourse currently available to homeowners in most cases is to commence a civil action, which is cost prohibitive for many homeowners and also puts the homeowner in the position of having to pay to pursue the litigation and at the same time funding the Board's defense

Finding 3 Disclosure

Need for greater disclosure by sellers of homes in planned communities concerning the restrictive covenants applicable to such real property

- Complaints by homeowners in planned communities often appear to reflect a lack of awareness or understanding of the existence of restrictive covenants at the time they purchased their homes
- G.S. 47E-4 requires sellers of residential real property to furnish purchasers with a residential property disclosure statement, using a form developed by the Real Estate Commission ("REC"), which must include, among other things, "restrictive covenants affecting the real property." The current disclosure statement, however, only requires disclosure of violations of restrictive covenants

Finding 4

Declarant Transfer Issues

Law should be clarified with regard to the obligations of a declarant (developer)

- Complaints received concerning abuses by a declarant (refusing to transfer control to the homeowners, failing to pay assessments on declarant-owned property, failing to properly record amendments to the declaration, and failing to properly complete actions required of the declarant such as approved stormwater systems)
- Unlike the Condominium Act, the Planned Community Act does not limit the time period in which a declarant may maintain control of the association

Finding 5

Consumer Protection

Need for additional consumer protections to better protect homeowners from abusive HOA practices

- Complaints received about unreasonable actions by boards include: arbitrary enforcement of covenants, excessive fines and attorney's fees, refusal to hold fair and open elections of officers, abuse of the foreclosure process, and failure of the law to give homeowners enough rights to challenge the actions of HOA Boards
- Boards can legally adopt and amend rules and regulations, make contracts and incur liabilities on behalf of an association, cause additional improvements to be made as part of the common elements and assess homeowners for those improvements, and such actions are often taken without giving notice or an opportunity to vote to homeowners

Finding 6

Foreclosure Issues

Although the PCA authorizes the use of foreclosure to satisfy HOA fines, the foreclosure statute was never intended for this purpose

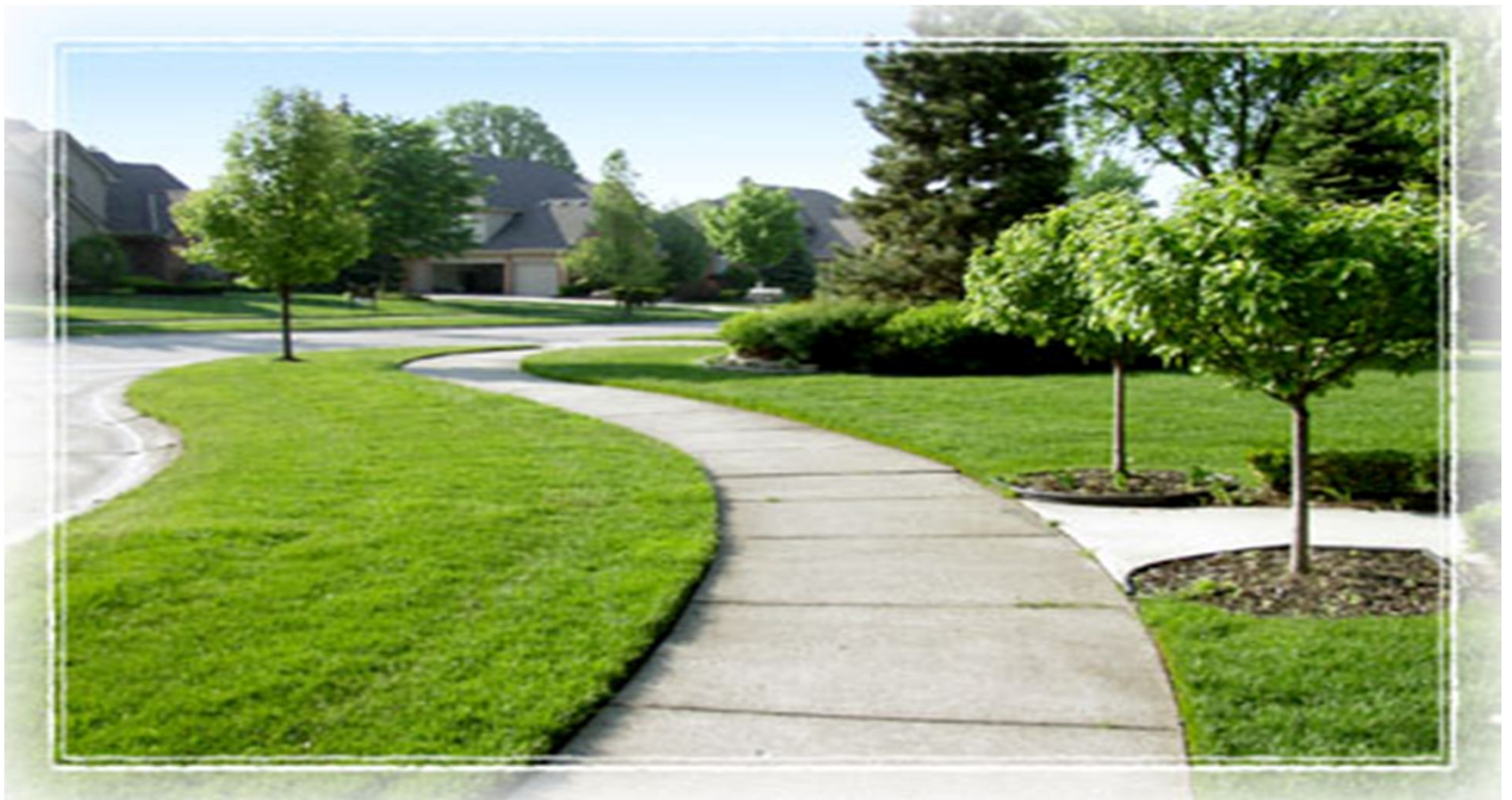
- Information received from the legal counsel to the Administrative Office of the Courts about a number of incongruities between the applicable statutes
- Suggestions offered to resolve these incongruities, and other suggestions offered to prohibit or limit use of foreclosure by HOAs in some or all cases

Finding 7

Clarification of Solar Access Law

- Law that invalidates any new restrictive covenants that prohibit installation of solar collection devices contains an exception that allows covenants to prohibit a solar device if it is visible from a roof slope or façade or faces a public access way. Information received that the exception has been used by HOAs to exclude solar devices altogether
- Suggestion received that the law be clarified to remove or limit the “visibility exception”

Potential action for Committee Consideration



Board Accountability (2)/ Consumer Protection (5)

- Adopt the Uniform Common Interest Owners Bill of Rights Act. (UCIOBRA)
- Authorize or require that disputes between HOAs & homeowners be submitted to nonbinding alternative dispute resolution as a prerequisite to commencement of a judicial proceeding (UCOIBRA Sec. 8 authorizes)
- Add provisions governing board discretion in enforcement (UCOIBRA Sec. 8)
- Establish open meeting requirements (UCOIBRA Secs. 11 & 12)
- Enhance record-keeping requirements (UCOIBRA Sec. 16)
- Institute procedures a HOA must follow that prior to: (1) adopting, amending, or repealing any rule; or (2) imposing a special assessment (UCOIBRA Sec. 17)

Board Accountability (2)/ Consumer Protection (5) (con't)

- Allow imposition of punitive damages for a HOA's willful failure to comply with consumer protection provisions (UCOIBRA Sec. 21)
- Create a new State-level agency to register and oversee the activities of homeowner associations as provided in Article 5 of the Uniform Common Interest Ownership Act, or empower current State entity to do so (Real Estate Commission (REC)). Possible model is Virginia's Common Interest Community Board and The Office of the Common Interest Community Ombudsman

Disclosure (3)

- Either request the REC to amend the disclosure form to require sellers to disclose the existence of HOAs and covenants or amend G.S. 47E-4 to require this change to the form. In addition, strengthen the disclosure requirement by:
 - eliminating the option of making “no representation” currently permitted under G.S. 47E-4(a)(2) (only with respect to the new disclosure of HOAs and restrictive covenants)
 - amend G.S. 47E-2(9), which currently exempts “the first sale of a dwelling never inhabited” from the disclosure requirements of G.S. 47E-4, to require the new disclosure of HOAs and restrictive covenants in the first sale

Disclosure (3)

- Amend the Planned Community Act to require all sellers of property in planned communities to provide purchasers with a copy of the declaration, covenants, bylaws, and the association rules and regulations (as is required under the Uniform Common Interest Ownership Act)
- Amend the Planned Community Act to require sellers to provide prospective buyers of lots in planned communities with a brochure to be developed by the REC advising them in simple, understandable terms of basic powers of HOAs, examples of restrictions to which they may be subject, and how to obtain a copy of the governing documents containing the restrictions that apply to the property in question

Declarant Transfer Issues (4)

Add language to PCA that:

- Option 1 - Specifies time limit for declarant control
- Option 2 - Specifies obligations and liabilities of declarant who transfers declarant interest
- Option 3 - Allows HOA to terminate contracts and leases entered into by declarant during period of declarant control
- Option 4 - Provides HOA or lot owners with right of action and remedy against declarant for breach of contract or tort during period of declarant control

Declarant Transfer – Option 1

- PCA states that declaration may provide for period of declarant control
- Condominium Act specifies when declarant control must end - no later than two years after the last offering of a unit for sale by the developer

Declarant Transfer – Option 1 (con't)

G.S. 47C-3-103(d) of the Condominium Act reads:

“Regardless of the period provided in the declaration, a period of declarant control terminates no later than the earlier of: (i) 120 days after conveyance of 75% of the units to unit owners other than a declarant; (ii) two years after all declarants have ceased to offer units for sale; or (iii) two years after any development right to add new units was last exercised.”

Declarant Transfer – Option 2

Condominium Act sets out liability when transferor transfers any special declarant right.

Declarant Transfer – Option 2 (con't)

G.S. 47C-3-104(b) of the Condominium Act reads:

“Upon transfer of any special declarant right, the liability of a transferor declarant is as follows:

1. A transferor is not relieved of any obligation or liability arising before the transfer.
2. If the successor to any special declarant right is an affiliate of a declarant, the transferor is jointly and severally liable with the successor for any obligation or liability of the successor which relates to the condominium.
3. If a transferor retains any special declarant right, but transfers other special declarant rights to a successor who is not an affiliate of the declarant, the transferor is liable for any obligations or liabilities imposed on a declarant by this chapter or by the declaration relating to the rights and arising after the transfer.
4. A transferor has no liability for any act or omission or any breach of a contractual or warranty obligation arising from the exercise of a special declarant right by a successor declarant who is not an affiliate of the transferor.

Declarant Transfer – Option 3

- PCA allows association to terminate contracts and leases entered into by the declarant before the executive board elected by the unit owners takes office, but only if the contract or lease is not in good faith or was unconscionable to the lot owners.
- Condominium Act expands the authority to terminate contracts and leases during declarant control.

Declarant Transfer – Option 3 (con't)

G.S. 47C-3-105 of the Condominium Act reads:

“If entered into by or on behalf of the association before the executive board elected by the unit owners takes office, (1) any management contract, employment contract, or lease of recreational or parking areas or facilities, (2) any other contract or lease between the association and a declarant or an affiliate of the declarant, or (3) any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into under the circumstances then prevailing may be terminated without penalty by the association at any time after the executive board elected by the unit owners takes office upon not less than 90 days’ notice to the other party.”

Declarant Transfer – Option 4

- Both the PCA and Condominium Act toll any statute of limitation affecting an association's right of action against the declarant for a tort or breach of contract by the declarant during the period of declarant control.
- The Condominium Act sets out the lot owners' right of action and remedy for the declarant's tort or breach of contract.

Declarant Transfer – Option 4 (con't)

G.S. 47C-3-111(c) of the Condominium Act reads:

“If an action is brought against the association for a wrong which occurred during any period of declarant control, and if the association gives the declarant who then controlled the association reasonable notice of and an opportunity to defend against the action, such declaration is liable to the association:

1. For all tort losses not covered by insurance carried by the association suffered by the association or that unit owner, and
2. For all losses which the association would not have occurred but for a breach of contract.”

Declarant Transfer – Option 4 (con't)

G.S. 47C-3-111(d) reads:

“In any case where the declarant is liable to the association under this section, the declarant is also liable for all litigation expenses, including reasonable attorneys’ fees, incurred by the association.

Declarant Transfer Recap

Only the North Carolina Condominium Act contains language that specifies:

- Time limits for declarant control
- Obligations and liabilities of declarant transferor
- Expansive authority of lot owners to terminate contracts and leases entered into by declarant during period of declarant control
- Lot owners' right of action and remedy against tort or breach of contract by declarant during period of declarant control

Foreclosure (5)

- Impose one or more of the following limitations on a HOA's authority to use foreclosure to enforce a lien, as recommended in the UCIOBRA
 - The assessment must be at least 3 months past due and the unit owner has failed to accept or comply with a payment plan offered by the association.
 - The executive board must vote to commence foreclosure against the specific unit.
 - The association must apply any payments made by the homeowner first to unpaid assessments, then to late charges, then to attorneys' fees and other collection charges, and finally to unpaid fees, fines, interest, and late fees.
 - The association may not use foreclosure to enforce a lien resulting from unpaid fines and related sums, unless the association has obtained and perfected a judgment against the homeowner.
 - All aspects of the foreclosure must be commercially reasonable.

Clarification of Solar Access Law (7)

- Remove the “visibility exception”
- Limit the “visibility exception,” as other states have done, by:
 - Limiting ability to require modifications to a solar energy system (for aesthetics) that exceed a certain cost; or
 - Limiting required modifications (for aesthetics) that reduce the operating efficiency of the system.

Questions?



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